Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-832

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

OLYMPIC SPORTS PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID P. CHRISTIANSON, ESQ.
500 S. Main Street
North Tower, Suite 925
Orange, California 92668
Telephone (714)543-2398

Attorney for Respondent
OLYMPIC SPORTS PRODUCTS, INC.

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding a state law relating to dismissal of actions is inapplicable in federal courts even though jurisdiction is based solely upon diversity of citizenship?

2. Did the court below err in its interpretation of California's construction of its mandatory dismissal law for failure to bring a case to trial within a specified period of time.

3. Did the decision of the court below conflict with the standard of review utilized by other circuit courts of appeal.

PARTIES INVOLVED

Three separate corporations were parties in the court below. Plaintiff and respondent herein, Olympic Sports Products, Inc. ("Olympic"), a Florida Corporation, Defendant and petitioner herein, Whittaker Corporation

("Whittaker"), a California corporation, and a codefendant and counter-claimant herein, Universal Gym Equipment, Inc. ("UGE"), a California corporation, UGE's counterclaim is only against Olympic.

TOPICAL INDEX

Questions Presented for Review..... i

Parties Involved..... i

Official and Unofficial Reports..... 1

Jurisdiction..... 2

Constitutional Provisions..... 2

Statement of the Case..... 2

Argument..... 5

1. Statement of Facts..... 5

2. The Ninth Circuit Court properly found that Rule 41(b) governed the question of dismissal and that the District Court erred in applying the State Statute instead of the federal rule.....11

3. The majority decision and the court below properly followed California's construction of CCP Section 583(b) of the code of civil procedure.....21

Conclusion.....39

TABLE OF AUTHORITIES CITED

Cases Page

Alonzo v. ACF Property Management, Inc., 643 F.2d. 578(9th Cir. 1981).....19

Butler v. Hathcoat, 146 Cal.App.3d 834, 838-39, ___ Cal.Rptr. ___ (1983).....19, 30

Christin v. Superior Court, 9 Cal.2d 526, 532, 71 P.2d 205 (1937).....28

Erie Ry. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).....11, 13, 14, 20

Griffis v. S. S. Kresge Co., ___ Cal.App.3d ___, 197 Cal.Rptr. 771, 774 (1984.....26

Hanna v. Plumer, 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8](1965).....5, 15

Hocharian v. Superior Court, 28 Cal.3d 714, 724, 170 Cal.Rptr. 790, 621 P.2d. 829 (1981) 19,26,27,29,30,31,32

Holder v. Sheet Metal Worker's Internat'l. Ass'n., 121 Cal.App.3d 321, 325, 175 Cal.Rptr. 313 (1981) 31

Karubian v. Security Pac. Nat. Bank, 152 Cal.App.3d 134, 139, ___ Cal Rptr. __(1984).....26, 27, 36

Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759 (5th Cir.1963) 16, 17, 18, 20

Moran v. Superior Court, 35 Cal.3d 229, 197 Cal.Rptr. 546 (1983) 26, 27, 28, 32

Nealey v. Transportacion Maritima Mexicana, 662 F.2d 1275 (9th Cir. 1980).....12, 13, 14, 15, 20

Walker V. Armco Steel Corp., 446 U.S. 740, 100 S.Ct. 1979,64 L.Ed.2d. 659 (1980) 18, 20

Westinghouse Elec. Corp. v. Superior Court, 143 Cal.App.3d 95, 191 Cal.Rptr. 549 (1983).....32, 34, 35

STATUTES

28 United States Code

Section 1332..... 4

California Code of Civil Procedure

Section 583.....12, 13, 14, 16, 19, 29

Section 583(b)...4, 10, 11, 12, 16, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38

Federal Rule of Civil Procedure

41(b).....4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 37

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OFFICIAL AND UNOFFICIAL REPORTS

OF OPINIONS DELIVERED

IN THE COURTS BELOW

The official and unofficial reports of opinions delivered in the courts below were attached as appendices to the petition for writ of certiorari filed on

behalf of Whittaker Corporation. Accordingly it is not deemed necessary or appropriate to duplicate those in this brief.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petition for writ of certiorari identifies the grounds upon which the petitioner contends this court has jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES, ETC. WHICH THE CASE INVOLVED

No constitutional provision or treaties appear to apply in this case.

STATEMENT OF THE CASE

This case involves a series of distributorship agreements entered into between respondent Olympic Sports Products, Inc. ("Olympic") and appellant Whittaker Corp. ("Whittaker"). Respondent acted as distributor of appellant's athletic equipment from 1965

until 1976. The distributorship agreements provided that Olympic would pay for the freight charges incurred by appellees in transporting the athletic equipment to Olympic. However, Olympic discovered that instead of passing through the freight charges incurred appellees were making a secret profit by overcharging Olympic for said transportation in a sum in excess of $375,000,00.

Accordingly, respondent filed suit for breach of the agreements and fraud in the United States District Court, Central District on March 1, 1978. (E.R. 1) Appellant Whittaker filed a motion to dismiss the action. Subsequently, the District Court granted the motion and dismissed the case of September 14, 1983, expressly pursuant to California Code of

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[1] E.R. refers to the Excerpts of Record filed by appellant.

Civil Procedure Section 583(b) ("CCP Section 583(b)") for respondent's failure to bring the case to trial within five (5) years from the filing of the complaint. (A.B. 3a)[2] (E.R. 78) In concluding it had no discretion but to dismiss, the District Court found the California statute was substantive rather than procedural, and therefore Federal Rule of Civil Procedure 41(b) ("Rule 41(b)")(A.B. 2a) did not apply. (E.R. 81-82)

The basis for subject matter jurisdiction in the district court was diversity of citizenship under 28 U.S.C. Section 1332. The district court's decision was subsequently reversed by the court below on the ground that the California Code of Civil Procedure Section 583(b) was "discretionary" and, therefore, in accordance with the analysis outlined

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[2] A.B. refers to appellant's Addendum to Brief.

in Hanna v. Plumer, 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8](1965), Rule 41(b) of the Federal Rules of Civil Procedure had to govern.

ARGUMENT

1. Statement of Facts.

Respondent filed its complaint for breach of contract and fraud on March 1, 1978. (D.E. 1) The pre-trial conference was set for April 9, 1979, and was continued by stipulation to July 9, 1979. (D.E. 17, 18) Thereafter, Whittaker sought a further continuance of the pre-trial conference to November 19 of that year. (D.E. 19) Both respondent's and appellant's pre-trial documents were filed in advance of the November date. (D.E. 22-24) On the Court's own motion the conference was further continued to January 21, 1980. Whittaker opposed the setting of a trial date since it intended to conduct discovery and announced its

intention of filing a motion for summary judgment and upon that basis the parties stipulated to a further continuance to February 4, 1980. (D.E. 25, 26) Subsequently, all parties filed motions for summary judgment and, in addition, Whittaker filed motions for leave to amend its answer and to file a counterclaim. These motions were set for hearing on February 11, 1980, and the Court, on its own motion, consolidated these matters by continuing the pre-trial conference to February 11, 1980. (D.E. 28-30) (D.E. 34) On that date, the Court entertained oral argument on the various motions, then took them under submission. (D.E. 43)

Ten (10) months later, on December 8, 1980, the Court issued a decision denying all motions for summary judgment, but granting Whittaker leave to file a first amended answer and counterclaim. (D.E. 44) This case thereafter entered into a

whole new phase of discovery with Whittaker's counterclaim introducing several new issues after the case had been pending for over 2-1/2 years.

Thereafter, when it became apparent the Court would not set a pre-trial conference on its own, UGE was joined by respondent in a motion requesting a pre-trial conference which was scheduled for hearing on April 22, 1982. Respondent and UGE were fully prepared to proceed to trial at this time. However, the motion was opposed by Whittaker, who moved to dismiss the action under Rule 41(b). (D.E. 48) Whittaker's motion to dismiss was not brought under California law, but was grounded solely upon the Federal Rules, which was the basis upon which respondent opposed the the motion. (D.E. 49, 50) The motion was not heard as scheduled, but instead was continued to June 14 on the Court's own motion (D.E.

47) However, Whittaker then requested a continuance which the Court granted. (D.E. 54) The motions were finally heard on June 21, 1982, at which time the Court denied Whittaker's Rule 41(b) motion to dismiss. At this hearing, the Court postponed the pre-trial conference upon Whittaker's request after it convinced the Court of its need to conduct discovery it claimed was necessary to prepare for trial. (D.E. 53; E.R. 97, 101)

Curiously, Whittaker never initiated the discovery despite respondent's willingness to cooperate. Respondent remained willing and able to go to trial as soon as Whittaker had completed discovery. Plaintiff's counsel contacted Defendant's counsel to schedule dates for discovery but was informed by Defendant's counsel that Defendant's counsel could not schedule dates because Defendant's counsel was involved in numerous pending trials

outside of the state. Defendant's counsel assured Plaintiff's counsel that the delay would not result in any further motions to dismiss and that depositions would be scheduled later in the year.

On March 1, 1983, five years elapsed on the complaint. The date passed unnoticed and unremarked by the parties, who believed Rule 41(b) was controlling.

On May 3, 1983, respondent decided it had waited long enough for Whittaker to take its discovery, and filed a second motion for pre-trial conference joined by UGE. (D.E. 56) Whittaker opposed the motion, and refiled its motion to dismiss. (D.E. 58, 59) Less than a year before Whittaker had made a futile attempt to persuade the Court to dismiss the case under Rule 41(b). The continuance afforded by the Court after that denial had been solely at the request of Whittaker and for its benefit alone.

Whittaker thus had no factual basis upon which to base a second Rule 41(b) motion and was forced to bolster its request by arguing that CCP Section 583(b) was controlling, thus mandating that the Court dismiss the action. This was the first instance in which California procedure was suggested to be controlling.[3] Both motions were continued to June 20, 1983, again at Whittaker's request, at which time the Court preliminarily granted Whittaker's motion to dismiss under California law, although the Court took the motion under submission. (D.E. 60, 65; E.R. 102) At the hearing, the Court declared that CCP Section 583(b) was controlling and that it had no choice but to dismiss. (E.R. 105,

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[3] Judge Stephens stated that CCP Section 583(b) was introduced into the case in the 1982 motion to dismiss. (E.R. 105) However, a review of the transcript of proceedings for that hearing, (E.R. 90) and the moving and opposing papers involved, (D.E. 48, 49) show no such reference to California law.

116) Over three months later, the Court issued a decision dismissing the action, and entered judgment on September 30, 1983. (D.E. 66, 68) On appeal before the Court of Appeals for the Ninth Circuit Court, the decision was reversed.

2. The Ninth Circuit Court properly found that Rule 41(b) governed the question of dismissal and that the District Court erred in applying the State Statute instead of the federal rule.

The long standing doctrine of Erie Ry. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny established the applicability of state substantive laws, but not state rules of procedure, to federal diversity cases. Respondent submits that CCP Section 583(b) is not a substantive law, but merely a procedural rule of case management, which permits dismissal if an

action is not brought to trial within five years of being filed. The rules governing the dismissal of federal actions, including diversity cases, are embodied in Rule 41(b), which rule provides for discretionary dismissal for the failure to prosecute. In ruling that CCP Section 583(b) was controlling and thereby mandated the dismissal of the action for failure to bring it to trial within five (5) years, the District Court erroneously applied a California procedural statute.

Both Appellate Court cases have labeled CCP Section 583(b) and similar statutes as merely state housekeeping rules, unquestionably procedural in nature and clearly inapplicable to diversity cases. Specifically, the Ninth Circuit has previously construed CCP Section 583 as a procedural rule in Nealey v. Transportacion Maritima Mexicana, 662 F.2d 1275 (9th Cir. 1980), and that decision

should be controlling in the case at Bar. In Nealey, plaintiff failed to serve a complaint within three (3) years as is required under CCP Section 583 in an action initiated in state court, but subsequently removed to federal court.

The Ninth Circuit found the District Court erroneously applied CCP Section 583, a state procedural statute, in dismissing the action, indicating that Rule 41(b) was clearly controlling under the Erie doctrine. Footnote 5 to the decision is dispositive of the issue presented in this appeal. Insisting that state law should be controlling, that footnote relates how Nealey's brief argued the nonapplicability of Rule 41(b) to removed actions. At oral argument, Nealey's new attorney conceded the applicability of federal law. The Ninth Circuit stated in this footnote:

> We believe that under the doctrine of Erie R.R. Co. v.

> Tompkins, 304 U.S. 64, 58 S.Ct 817, 82 L.Ed. 1188 (1938), and its progeny, rule 41(b) is applicable to a removed action and may form the basis for dismissal of such an action. Nealey, supra, 662 F.2d at 1278.

In support of its view of the irrelevance of CCP Section 583, the Ninth Circuit specifically indicated:

> "the federal court is not the proper forum in which to serve the housekeeping interests of the state courts, the primary goal of 583." Id. at 1282.

Thus, in Nealey, CCP Section 583 was deemed procedural even though the case was commenced in state court and later removed to federal court. If CCP Section 583 is procedural within the context of Nealey, it remains procedural for all federal

diversity cases. The situation in the instant case presented to the Ninth Circuit Court an even stronger case, for unlike Nealey, the instant case was initially filed in the Federal Court. Accordingly Rule 41(b) was properly found to be controlling.

Nealey further stated with regard to Rule 41 (b) that once parties are in the federal system, "[t]hey must now recognize that the conduct of business here is motivated by our own house keeping concerns, and not those of our state court brethren." Nealey, supra, 662 f. 2d at 1279. This comports with "the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of these rules will inevitably differ from comparable state rules." Id., citing Hanna v. Plumer, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965). In reversing the lower

court decision applying CCP Section 583, the Ninth Circuit concluded that "no federal housekeeping interest was advanced by depriving respondent of this cause of action." Id. at 1279. (Emphasis in original).

The Second Court of Appeals case to declare a similar state statute to be procedural in nature is Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963). Lumbermen's also involved a diversity case wherein the failure-to-prosecute statute of Louisiana was deemed inapplicable to federal actions. The statute under review, Article 3519 of the Louisiana Statutes Annotated Civil Code (A.B. 4a), is virtually identical to CCP Section 583(b) in deeming abandoned any action wherein nonprosecutorial steps have been taken for five (5) years.

The Court of Appeals in Lumbermen's

found Rule 41(b) and Article 3519 did not necessarily cause a collision between conflicting federal and state policies. "Here there is federal law, Rule 421(b), covering the problem created by a litigant's lack of prosecution of a case." Lumbermen's, supra, 322 F.2d. at 764. In affirming the Court's earlier decision, the purpose of the Federal Rules was stated to be to increase uniformity in federal courts "by getting away from local rules." Id. The Court of Appeals stated:

> Rule 41 specifically regulates the dismissal of actions. The rule is essentially a matter of federal courts administering the cases before them, and has no necessary relation to a state system of limitations. As long as there is still the breath of life in a suit kept alive by

> the federal courts, it strikes us as unseemly to allow the state to kill the case . . . .
>
> If we should require Rule 41(b) to yield to Article 3619, the discretionary powers of a federal district court would be seriously curtailed. Id. at 765.

The Fifth Circuit in Lumbermen's further rejected the argument that the Louisiana statute was tantamount to a statute of limitations and, therefore, substantive in nature. The statute is deemed not one of prescription, but only as a provision of Louisiana general practice and procedure. Lumbermen's, supra, 322 F.2d. at 763. Clearly, statutes of limitations which govern the time frame within which a legal right must be exercised are substantive in nature, as were the rulings in both Walker V. Armco

Steel Corp., 446 U.S. 740, 100 S.Ct. 1979,64 L.Ed.2d. 659 (1980), and Alonzo v. ACF Property Management, Inc., 643 F.2d. 578(9th Cir. 1981).

Clearly, California Courts view CCP Section 583 as a purely procedural function of "judicial concern", not integral to any substantive law. Hocharian v. Superior Court, 28 Cal.3d 714, 724, 170 Cal.Rptr. 790, 621 P.2d. 829 (1981); Butler v. Hathcoat, 146 Cal. App.3d 834, 838-39, ___ Cal.Rptr. (1983). As long as the plaintiff has exercised reasonable diligence in pursuing his action, California courts will try cases on their merits despite delays in excess of CCP Section 583(b) "limits". Hocharian, Id. at 721. The sole purpose of CCP Section 583(b) is to insure diligence and conscientiousness on the part of litigators in bringing cases to trial by placing a five-year cutoff on

trial preparation. Yet, as will be seen below, CCP Section 583 (b) has been construed as inapplicable when delays in the progress of litigation are not a result of plaintiff's conduct.

The principles set forth in Erie and its offspring, including Walker in the Supreme Court, and Nealey and Lumbermen's in the Court of Appeals, establish CCP Section 583(b) as a state procedural rule of court administration not applicable to federal diversity cases. Rule 41(b) absolutely controls the progress of cases, and their disposition for failure to prosecute. Only Rule 41(b), therefore, could have been applied to respondent's case, although this rule was not a factor in the District Court's decision to dismiss the complaint.

In the instant case, the District Court erred in linkening CCP Section 583(b) to a statute of limitations and

deeming it to be binding, substantive law. As discussed above, CCP Section 583(b) is not a statute of limitations. It has no bearing on respondent's ability to exercise the legal rights which form the underlying bases of the lawsuit. CCP Section 583(b) focuses on the conduct of the parties after the suit has commenced and serves as a housekeeping rule which governs the progress of cases at all stages of litigation.

As noted above, the California State courts would not have ruled dismissal to be mandatory under CCP Section 583(b) and the Ninth Circuit court of appeals properly determined that Rule 41(b) applied, thereby reversing the decision of dismissal of the District Court.

3. The majority decision and the court below properly followed California's construction of CCP Section 583(b) of the court of

civil procedure.

Despite the apparent mandatory language of CCP Section 583(b) that civil cases "shall be dismissed" if not brought to trial within five years, California courts have developed exceptions that allow a court to use its discretion in applying the statute. In the instant case, the District Court failed to exercise its discretion, and even believed it had none, and therefore granting of dismissal without considering CCP Section 583(b)'s exceptions was an abuse of discretion.

California courts would not hold respondent Olympic responsible for the case extending beyond five years. Respondent was ready for trial long before the five years passed. All of the delay from the time respondent was prepared to go to trial in 1979, and again in 1982, is attributable to Whittaker and the District

Court. Respondent filed its pre-trial documents on November 13, 1979. (D.E. 23) Continuances on behalf of the Court and Whittaker delayed the hearing to February 11, 1980. (D.E. 25, 26, 34) The Court then took ten months to decide the motions, during which time it would have been unreasonable for the parties to conduct any additional discovery. When the motion was granted on December 8, 1980, there ensued two years of intensive discovery on the part of respondent, on account of the new issues interjected into the case by Whittaker's counterclaim which the District Court allowed after the case had been pending for over 2-1/2 years. After its December 1980 ruling, the Court did nothing to move the case toward trial, failing even to set the case for pre-trial conference. Respondent finally had to motion the Court in May 1982, which motion was continued by the Court and Whittaker.

(D.E. 51, 47, 54) On June 21, 1982, the Court denied Whittaker's Motion to Dismiss, and postponed the pre-trial conference to allow Whittaker to conduct discovery necessary for trial. (D.E. 53)

Whittaker procrastinated until respondent was forced to file another motion on May 3, 1983. (D.E. 56) The Court continued the pre-trial conference to June 20, and on that date the Court took the various motions under submission. (D.E. 60, 65) Three months later, the Court finally dismissed respondent's complaint and UGE's counterclaim, and entered final judgment on September 30, 1983. (D.E. 68)

This abbreviated chronology shows that respondent was prepared to go to trial on November 13, 1979, when it filed its pre-trial documents. Whittaker and the Court were thereafter responsible for over a year of delay. The Court's failure

to set a pre-trial conference in either 1982 or 1983 resulted in further delays to the parties, to the extent that respondent had to move on two occasions to force the Court to set a pre-trial conference. At each such motion, Whittaker filed opposition and sought postponements of the pre-trial conference. Whittaker's procrastination in failing to take the depostions of plaintiff's witnesses it claimed were necessary was responsible for over a year of delay, during which the five-year period ran. At no time could respondent be held responsible for any delay, other than in extending the usual professional courtesy to Whittaker to allow it the opportunity to prepare for trial.

California law says discretion in applying CCP Section 583(b) exists, and must be exercised. The object of CCP Section 583(b) is to avoid endless,

unmeritorious actions, and lost evidence or memories. Moran v. Superior Court, 35 Cal.3d 229, 197 Cal.Rptr. 546 (1983). In the Moran case, the California Supreme Court refused to uphold dismissal under CCP Section 583(b), although the complaint was filed more than five years before trial was set. The Court found the appropriate guideline for evaluating whether CCP Section 583(b) will apply to a given case is the "reasonable diligence" standard. Id. at 239; Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829 (1981); Karubian v. Security Pac. Nat. Bank, 152 Cal.App.3d 134, 139, ___ Cal Rptr. (1984); Griffis v. S. S. Kresge Co., Cal.App.3d ___, 197 Cal.Rptr. 771, 774 (1984). If the plaintiff has demonstrated reasonable diligence in pursuing his action, in the Court's view CCP Section 583(b) has been met. Any dismissal of the

case under the statute would then be an abuse of discretion. Id.

The reasoning underlying the reasonable diligence standard of CCP Section 583(b) is to accomplish the prevention of avoidable delay. Five years is thus not the arbitrary close to all proceedings. Id. at 238. Compliance with CCP Section 583(b) is not required when caused beyond the control of plaintiff make it impossible, impracticable, or futile to begin trial in five years. Karubian, supra, 152 Cal.App.3d at 139. "The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." Moran, supra, 35 Cal.3d at 238; Hocharian, supra, 28 Cal.3d at 720.

The Supreme Court found the Moran plaintiff's overall conduct during the five years demonstrated reasonable

diligence. She actively participated in discovery, made motions, and participated in arbitration hearings. When the five year deadline approached, she actively attempted to set the case for trial. Moran, supra, 35 Cal.3d at 239-40. The Court found the plaintiff had demonstrated reasonable diligence, and therefore the impossibility exception to CCP Section 583(b) excused plaintiff's failure to bring the case to trial within five years. Id. at 240. The Court's holding focused on the reasonableness of plaintiff's conduct, and that others were the source of delays. Thus the Court did not find CCP Section 583(b) controlling, stating that "[d]espite the mandatory language of the section, this court has made an effort to 'set [] reality above artificialty' in applying CCP Section 583(b)." Id. at 237, citing Christin v. Superior Court, 9 Cal.2d 526, 532, 71 P.2d

205 (1937).

The California Supreme Court's responsible diligence standard originated in Hocharian v. Superior Court, 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829 (1981). In that case, plaintiff failed to discover a possible defendant within the three years granted by statute. The Court stated that the result of an inflexible interpretation of CCP Section 583 is often unfair. If the plaintiff has exercised reasonable diligence, actions should be tried on the merits despite delays in excess of statutory limits. The Court clearly stated that CCP Section 583 does not require "a plaintiff to be more than reasonably diligent." Id. at 721. Thus, when compliance is impossible, impracticable or futile, it is excused. Id.

To determine whether a factual situation falls under an exception to CCP

Section 583(b), the critical question for California courts is whether the plaintiff's unreasonable conduct led to noncompliance with the statute. Id. at 722 fn. 6. Plaintiff's conduct is thus the focus of the reasonable diligence inquiry. Id. Applying this test to the facts, the Hocharian Court found the plaintiff had been reasonably diligent. In the absence of demonstrable prejudice, dismissal for failure to comply with the case progress statute was reversed, mandating a hearing as to whether the plaintiff had prosecuted the action with reasonable diligence.

The California Court of Appeal refused to order dismissal under CCP Section 583(b), despite failure to begin trial within five years, in Butler v. Hathcoat, 146 Cal.App.3d 834, Cal.Rptr. ___ (1983). In that case, eight years passed between the date the

complaint was filed and the date the dismissal was granted. The Court cited to Holder v. Sheet Metal Worker's Internat'l. Ass'n., 121 Cal.App.3d 321, 325, 175 Cal.Rptr. 313 (1981), in stating the philosophy behind dismissal statutes such as CCP Section 583(b) of trying cases on their merits whenever possible. Id. at 838-39. This philosophy examines each case on its own particular facts in determining whether dismissal affords substantial justice. Courts will therefore allow exceptions to CCP Section 583(b)'s apparently mandatory language to provide diligent plaintiffs their day in court, despite delay which might otherwise point to dismissal. Id.; Hocharian, supra, 28 Cal.3d at 721.

It would be unfair in the instant case to deny respondent a trial on the merits when reasonable diligence has been demonstrated. Like the plaintiffs in

Moran and Hocharian, respondent was active in conducting discovery through the five year period. Documents proving respondent's damages, which were either lost or destroyed by Whittaker, had to be laboriously reconstructed by respondent's expert. (E.R. 95-99) Once this project was completed, respondent was ready and eager to proceed to trial, as demonstrated by its Motions for Pre-Trial Conference. There is no evidence that Whittaker was prejudiced in any way. Indeed, Whittaker stated at the June, 1982 hearing that the documents necessary for trial had not been in Whittaker's possession since before 1978. Thus, the reasonable conduct of respondent, and lack of prejudice to appellant, indicates the inapplicability of CCP Section 583(b).

A case dealing with facts closely similar to respondent's is Westinghouse Elec. Corp. v. Superior Court, 143

Cal.App.3d 95, 191 Cal.Rptr. 549 (1983). In that case, plaintiff filed an At-Issue Memorandum, but the settlement conference was continued, at the request of defendant, to permit defendant to file a cross-complaint. Plaintiff agreed to several further continuances to enable the various defendants to cross-complain and answer. Finally, more than five years after the complaint was filed, all parties submitted Settlement Conference Statements. One defendant estimated that discovery would take an extra period of time to complete. At the settlement conference, it was discovered that the five years had run, and a motion to dismiss was thereafter made and denied by the trial court.

The trial court had found plaintiff not responsible for the delay in bringing this case to trial, and no existing prejudice to defendants from the delay.

The court found nearly all of the delay was at the request of the defendants or for their benefit. Id. at 102. On these bases, the motion to dismiss under CCP Section 583(b) was denied.

The California Court of Appeal found CCP Section 583(b) did not apply to the facts of the case, because it was beyond the plaintiff's control to bring the action to trial within five years. In the Appellate Court's view, the policy behind the exception to CCP Section 583(b), of disposing of actions on their merits rather than on procedural grounds, characterized CCP Section 583(b) as a procedural rule. Westinghouse, supra, 143 Cal.App.3d at 104.

As an example, the Court stated that if plaintiff has completed discovery and is ready to go to trial, but the defendant is not diligently pursuing discovery, it is defendant's fault that the case is not

brought to trial. In such a case, impracticability excuses compliance with CCP Section 583(b) "if plaintiff's conduct is otherwise reasonable." Id. at 106.

Even though plaintiff was somewhat inadvertent in missing the five-year deadline, the Court looked to all circumstances in the case to find that impracticability remained. Westinghouse, supra, 143 Cal.App.3d at 106. It was of importance to the Court that the defendant's lack of preparation and delays were responsible for the five-year passing. And, as in appellant's case, there was no prejudice shown to defendants by the delays, despite the usual presumption of such. Finally, the Court did not wish to penalize plaintiff for its courtesy in stipulating to continuances. Id. at 107. Thus, plaintiff's conduct was reasonably diligent, and its inadvertence was excused. Id. at 110.

In view of the above cases, it is clear respondent should not be held responsible for the periods of inactivity which delayed this case. The circumstances made it impossible for respondent to comply with CCP Section 583(b), so under California decisional law CCP Section 583(b) is inapplicable. Karubian, supra, 152 Cal.App.3d at 139.

More importantly, the District Court stated it had no discretion in the matter but to dismiss. California courts, however, look to various factors, including prejudice and the reasonable diligence of plaintiff, before deciding whether CCP Section 583(b) should be applied. These exceptions to CCP Section 583(b) are demonstrated in the facts of this case. Trial on this case would have been held no later than four years after the suit had been commenced but for the delays caused by Whittaker and the

District Court.

Unquestionably, the case could not have come to trial before 1982, as Whittaker's counterclaim was only filed in late 1980. That counterclaim raised substantially new issues in the case requiring respondent to conduct additional discovery which was not accomplished until early 1982, at which time respondent joined in the first motion requesting a pre-trial conference. Whittaker opposed the motion, and filed its first motion to dismiss under Rule 41(b). Whittaker's motion was denied, although the Court did grant Whittaker a postponement of the pre-trial conference so as to enable it to conduct discovery.

In that first motion, Whittaker never asserted the applicability of state procedural rules to a federal diversity action. In fact, when Whittaker sought and was granted a postponement of the

pre-trial conference in order to take discovery, it failed to advise the Court of any pending five-year statute. The only conclusion to be drawn is that Whittaker was either unaware of CCP Section 583(b) or was consciously seeking the postponement with the intent of delaying the case beyond five-years in order to bring the CCP Section 583(b) motion. As Whittaker never initiated the discovery it so feverishly sought to take, it can be forcefully argued that the requested postponement was merely a ruse.

Under California law it would be error to reward Whittaker for such dilatory conduct by applying CCP Section 583(b). Therefore, even in the event CCP Section 583(b) does apply, it was clearly an abuse of discretion for the District Court to fail to exercise its discretion to exempt respondent from dismissal under CCP Section 583(b).

CONCLUSION

In view of the above authorities and analysis, it is respectfully submitted that the court of appeals for the Ninth Circuit Court properly decided the issue and that the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID P. CHRISTIANSON, ESQ.
500 S. Main Street
North Tower, Suite 925
Orange, California 92668
(714)543-2398

By: _____

David P. Christianson
Attorney for Respondent
OLYMPIC SPORTS PRODUCTS, INC.

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Orange, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 500 S. Main Street, North Tower, Suite 925, Orange, California 92668; that on December 23, 1985, I served the within Brief in Opposition to Petition for Writ of Certiorari in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Orange, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

William F. Davis, Esq.
881 Alma Real Drive
Suite 305
Pacific Palisades, CA 90272

Ronald M. Greenberg
Phillips, Nizer, Benjamin, Krim & Ballon
9454 Wilshire Blvd.
Suite 500
Beverly Hills, CA 90212

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 1985, at Orange, California.

_____

David P. Christianson